

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a fifty-nine percent (59%) work disability and assessed the entire award to the respondent. Claimant requested this review and asks the Appeals Board to review the issue of nature and extent of disability. Respondent requested review of the issue whether the Administrative Law Judge erred when he considered opinions from a

labor market expert that were based upon medical opinion and information not in evidence and the issue of Fund liability. Those are the issues now before the Appeals Board for this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award should be modified.

Claimant is twenty-seven (27) years old, married, and has one child. Claimant worked for the respondent in Lawrence, Kansas, as a visual merchandising supervisor. On February 7, 1990 claimant's back popped when she was moving equipment with a coworker. Although her back was quite sore and uncomfortable after that incident, claimant continued to work for a few weeks until her symptoms increased to the point she felt she should consult her family physician. Claimant testified that during the period she worked before seeing her doctor, she refrained from heavy lifting and had others perform the more physical activities.

After a period of conservative treatment, claimant ultimately underwent surgery in September 1990 by Roger Jackson, M.D., a surgeon in Kansas City, Missouri, who performed a two-level fusion from L4 to the sacrum using rods and screws. Claimant did not return to work for the respondent and vocational rehabilitation services were unsuccessful in returning her to any employment. At the time of regular hearing, claimant remained unemployed and testified that she is sometimes restricted to bed because of her low back pain.

Claimant's family physician, John Phillip Gravino, D.O., a board-certified physician in family practice, testified on behalf of the respondent. Dr. Gravino testified he saw claimant on February 26, 1990 with a history that she had hurt herself lifting at work and since that time had increasing back pain. He diagnosed a lumbar and dorsal strain and referred claimant to an orthopedist, Dr. Kenneth Wertzberger.

Claimant presented the testimony of orthopedic surgeon Edward J. Prostic, M.D. Dr. Prostic saw claimant in March 1995 at her attorney's request. He believes claimant has sustained a forty percent (40%) whole body functional impairment as a result of her injuries, and "is capable of returning only to light duty employment that would allow her frequent change in position and not involve substantial bending or twisting at the waist, pushing or pulling, or use of vibrating equipment." He initially testified that five to ten percent (5-10%) of claimant's permanent partial functional impairment resulted from the initial lifting incident and the remainder of the impairment resulted from her continuing to work. This opinion was based upon Dr. Prostic's assumption that claimant continued to perform her regular work duties. However, on cross-examination he testified he would attribute much more of the functional impairment to the initial event rather than the activities that followed assuming claimant did not return to her regular duties following February 7, 1990, but instead had others doing the physical work for her. If the latter assumption were true, Dr. Prostic testified the worsening symptoms that claimant experienced after February 7, 1990 were merely a natural progression.

Dr. Prostic also testified at length regarding the results of a MMPI test that claimant took after her surgery. He testified that studies indicate people with MMPIs similar to claimant's have a less than ten percent (10%) chance of returning to work following surgery no matter how skillful the surgeon may be, and if that same person had not been operated on the odds of returning to work are fifty percent (50%).

Respondent presented the testimony of J. Allan Goodrich, M.D., a board-certified orthopedic surgeon who examined claimant at respondent's request in May 1995 for the purpose of obtaining an impairment rating. Dr. Goodrich testified he believes claimant has a fifteen percent (15%) whole body functional impairment according to the Fourth Edition of the AMA Guides. However, he acknowledges he did not consider range of motion defects or ankylosis which may be utilized to increase the diagnosis-based percentage of impairment as permitted by that edition of the Guides. He also testified that claimant's subjective complaints of persistent pain that is not relieved by recumbency and of not being able to work are consistent with her back condition. He was not asked his opinion of the restrictions and limitations claimant should observe or whether she was capable of working.

Respondent also presented the testimony of Penny Montgomery, Ph.D., a psychologist and the director of the Behavioral Pain Management Program that claimant attended. Under her supervision, claimant was administered two MMPIs (Minnesota Multiphasic Personality Inventory) to determine the existence of any psychological barriers to participate in the pain management program. The first test administered in June 1992 indicated a slight elevation on the somatic focus scale, but not outside the boundaries of what one would consider normal for someone with pain, and that claimant was angry and frustrated. Ms. Montgomery testified that claimant's MMPI indicated claimant has a personality profile characterized by a tendency to attract attention from significant family members for pain complaints. Another psychological test initially administered to claimant showed that claimant had a profile that indicated that her pain was dysfunctional. A second MMPI, administered to claimant at the conclusion of the pain management program in July 1992, indicated claimant had less symptomatic focus, less anger, and that she was functioning more independently. Another psychological test administered after completion of the pain management program indicated claimant's profile changed from dysfunctional to adaptive. Ms. Montgomery testified that claimant showed significant improvement in her physical, psychological and functional areas as a result of her accomplishments in the program. In all of her evaluations, Ms. Montgomery did not find any elements of malingering nor any indication that money or compensation might be a significant factor of secondary gain.

The Workers Compensation Fund presented the testimony of Peter Bieri, M.D., whom the Fund consulted for an opinion whether claimant sustained an additional work-related injury following the initial February 7, 1990 accident. Dr. Bieri is a fellow of the American Academy of Disability Evaluating Physicians. He testified he believes claimant did not sustain additional injury after February 7, 1990, assuming she had altered her work activities.

The parties presented the testimony of two individuals regarding claimant's loss of ability to perform work in the open labor market and claimant's loss of ability to earn a comparable wage as a result of her back injury. Michael Dreiling, a vocational rehabilitation counselor, testified on behalf of the claimant that in his opinion claimant was not employable. However, Mr. Dreiling based that conclusion upon the opinions of physicians that did not testify nor whose reports or opinions were otherwise placed into evidence. On the other hand, respondent's witness, Monty Longacre, a vocational rehabilitation counselor and job placement specialist, testified that considering Dr. Prostic's restrictions claimant has lost thirty-six percent (36%) of her ability to perform work in the open labor market but that she retains the ability to earn the same average weekly wage she was earning at the time of her injury and, therefore, has no loss of ability to earn a comparable wage.

Based upon the above evidence, the Administrative Law Judge found that the opinions of both Mr. Dreiling and Mr. Longacre should be considered and that claimant had sustained a fifty-nine percent (59%) permanent partial disability, which appears to be an average of their percentages of work disability. Because Mr. Dreiling considered medical

opinions and information regarding claimant's ability to work that were not introduced into evidence, respondent contends the Administrative Law Judge erred when he considered Mr. Dreiling's opinion. The Appeals Board agrees.

The determination of loss of ability to perform work in the open labor market and loss of ability to earn comparable wages is critical in determining an injured worker's right to permanent partial disability benefits under K.S.A. 1989 Supp. 44-510e. Unless the medical information utilized by the labor market expert is part of the evidentiary record, the expert's opinion that is based upon that information is without foundation and should not be considered by the trier of facts when timely objections are lodged. To hold otherwise would be to circumvent the intent of K.S.A. 44-519 (Ensley) that provides that no report of any examination by a health care provider is competent evidence to be considered in a workers compensation proceeding unless it is supported by the health care provider's testimony. Although claimant had the opportunity to introduce the medical opinion either by deposition or stipulation, the medical information considered by Mr. Dreiling and which constituted the primary basis for his opinions was never introduced into the evidentiary record.

Because hers is a "non-scheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1989 Supp. 44-510e. That statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the entire record, the Appeals Board finds claimant has an eighteen percent (18%) work disability based upon the testimony of Monty Longacre. This conclusion is based upon an average of claimant's thirty-six percent (36%) loss of ability to perform work in the open labor market and her zero percent (0%) loss of ability to earn a comparable wage.

The Appeals Board also finds the claimant has a twenty-eight percent (28%) whole body functional impairment and that her permanent partial disability benefits should be based upon that rating because it is higher than the work disability determined above. As previously indicated, Dr. Prosic believes claimant has a forty percent (40%) functional impairment and Dr. Goodrich believes she has a fifteen percent (15%). After considering both doctor's testimony, the Appeals Board believes that claimant's functional impairment rating falls somewhere between the ratings provided by them. Therefore, the Appeals Board finds that claimant's whole body functional impairment is twenty-eight percent (28%).

The Administrative Law Judge found that the respondent was entirely responsible for this Award. The Appeals Board agrees.

Based on claimant's testimony, the Appeals Board finds that it is more probably true than not true that claimant modified her work activities after she hurt her back on February 7, 1990, and after that date she no longer lifted the heavier items or performed other tasks requiring significant physical activity. When considering the entire record, including the testimony of claimant's physical therapist, the Appeals Board finds that claimant's symptoms worsened after February 7, 1990, because of the natural progression of the

injury rather than the result of a subsequent and distinct work-related accident. Because of this finding, the Workers Compensation Fund has no liability. See K.S.A. 1989 Supp. 44-567 that shifts liability to the Workers Compensation Fund only when an injured worker has sustained a second or subsequent injury that was either caused or contributed to by an earlier impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer entered in this proceeding on August 31, 1995 should be, and hereby is, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS in favor of the claimant, Jamie D. Roberts, and against the respondent, J. C. Penney Co., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury on February 7, 1990, and based upon an average weekly wage of \$299.09, for 158.14 weeks of temporary total disability compensation at the rate of \$199.40 per week or \$31,533.12, followed by 256.86 weeks at the rate of \$55.83 per week or \$14,340.49 for a 28% permanent partial general body disability, making a total award of \$45,873.61.

As of February 9, 1996, there is due and owing claimant 158.14 weeks of temporary total disability compensation at the rate of \$199.40 per week or \$31,533.12, followed by 155.29 weeks of permanent partial disability compensation at the rate of \$55.83 per week in the sum of \$8,669.84, for a total of \$40,202.96 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$5,670.65 is to be paid for 101.57 weeks at the rate of \$55.83 per week, until fully paid or further order of the Director.

Pursuant to the parties' stipulation, the Appeals Board hereby sets aside the finding contained in paragraph 21 of the Judge's Award that claimant is denied medical reimbursement for failure of proof.

The Appeals Board hereby adopts the remaining orders of the Administrative Law Judge that are not inconsistent with those specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, Kansas
James C. Wright, Topeka, Kansas
Anthony D. Clum, Topeka, Kansas
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director